

APRIL 24. 1767.

A N S W E R S

F O R

JAMES MACHARG of *Kiers, Quintin and Isabel Machargs*, his Children, Pursuers;

T O T H E

PETITION of *Colin Campbell* of *Kilberry*,
late Major-Commandant of the 100th
Regiment of Foot, Defender.

I N 1762, the petitioner *Colin Campbell*, then major-commandant of the 100th regiment of foot, which had been sent abroad upon the expedition to the *West-Indies*, was, by warrant of major-general *Monkton*, commander-in-chief of the *British* forces upon that expedition, directed to lieutenant-colonel *Eyre Massey*, president of the court-martial, summoned upon that occasion, indicted, and brought to trial for *the murder* of Captain *John Macharg*, an officer in said regiment; the result of which, was a sentence condemnator in the following words:

“ The court, on due consideration of the whole matter before them, is of opinion, that Major-commandant *Colin Campbell* is guilty of the crime laid to his charge; but
“ there not being a sufficient number of voices to punish
“ with death, as required by the articles of war, the court
“ does

“ does adjudge the said Major-commandant *Colin Campbell* to be cashiered for the same.—And it is the further opinion of the court, that he is incapable to serve his Majesty in any military employment whatsoever.”—And this sentence being reported to, and approved of by his Majesty, received execution, by his being cashiered, and dismissed from the service.

From the depositions of the witnesses examined upon that trial, it was most distinctly proved, that the occasion of this murder, was the umbrage and resentment which the petitioner had conceived against Captain *Macharg*, upon intelligence of the captain's having expressed himself in an improper and injurious manner of him the said *Colin Campbell*; that upon notice thereof, the said *Colin Campbell* did forthwith write a peremptor letter to the captain, requiring immediate satisfaction, importing a challenge to single combat: That immediately upon the back of said challenge, and without waiting a return to said letter, the petitioner, carrying a small sword in his hand, and a bayonet by his side, repaired to Captain *Macharg's* tent, whom he found sitting there; and, in the heat of passion, required the Captain to give him the satisfaction demanded: That as the Captain had then no arms but a broad sword, he excused himself from engaging upon such unequal terms: That the petitioner thereupon gave the Captain some strokes with the sword, seized him by the breast, and pulled him to the tent door, where being obliged to stand to his defence in the best manner he could, he received several wounds; that in the struggle, they both fell to the ground, the petitioner uppermost, who thereupon threatened the Captain with immediate death, if he did not beg his life; which in the agonies of death he was compelled to do, and that instant expired. That upon examining his wounds, they appeared to be no less than eleven in number, whereof *two* were judged to be mortal; that one of

of these wounds appeared to be given by a different instrument than a small sword, *in size and figure corresponding to the petitioner's bayonet, which at the time was found lying near the tent unsheathed*; and that the only wound the petitioner appeared to have received, was a slight cut upon the hand; so that, from every circumstance of the case, it carried all the appearance of being a foul murder, committed upon that young man, in a manner *unarmed*.

The exculpatory proof attempted on the petitioner's part, was, *1st*, To his character, as not being generally quarrelsome: *2dly*, That he met with such provocation, as none of his profession could put up with.—And it is not to be doubted, that if his conduct had, in other respects, been proper, and that this had appeared to have been a fair duel, his defence would have been most favourably received, when tried by a jury of brother-officers, all gentlemen of acknowledged probity, honour, and character.

But when the other circumstances attending this murder were taken into the scale of evidence, particularly the invasion made upon the Captain in his own tent, at that late hour of the night, the inequality of the weapons, the great number of wounds which the Captain had received, one of them appearing to be given by a different instrument than a small sword, and the defender's bayonet lying unsheathed at the tent door, the whole had so ugly an aspect, that the court could not avoid pronouncing him *guilty of the murder*.

From the wording of the sentence, it appears that the whole court was unanimous, in finding him guilty of the crime charged; but as the provocation received was by some judged to be sufficient so far to alleviate the crime, as to exeeem from a capital punishment; and as by means thereof, there was not such a majority of voices for the capital sentence as by the articles of war is required, the judgment thereupon pronounced was such as is above stated,

ed, *convicting him of the crime, but mitigating the punishment*, so as only to infer cashiering, and incapacity to serve his Majesty in any military employment.

The respondents, the nearest relations to this unfortunate young man, being advised, that in respect of the murder so committed, incontestibly proved and established by sentence of the only competent court to take trial thereof, a claim of assythment and damages arose to them; brought their action accordingly in this court, not with any view of making gain to themselves, or even of recovering the large sums which had been expended in his education for the army, purchasing his commission, equipping him for that expedition, and supporting him therein, all which, by his untimely death, are wholly lost to this family, but chiefly in order to enable them to do justice to the Captain's creditors; the extraordinary expences attending that expedition, having necessarily obliged him to contract considerable debts, which remain still unpaid.

The defences insisted upon, were in substance these following:—*1st*, That murder, not being a military crime, was not cognoscible by a court martial, but behoved to be tried in the courts of ordinary law, having a criminal jurisdiction; and therefore no regard could be had to the sentence pronounced by that court martial.—*2dly*, That the crime being committed in a foreign country, outwith the jurisdiction of this court, your Lordships could take no trial or cognizance thereof, to any purpose or effect whatsoever.—*3dly*, That the sentence of the court martial, proceeding upon the proof led before them, could not be received or admitted as legal evidence of the alledged murder, thereby to found the pursuers in the present action of assythment and damages.—*4thly*, That as by the antient law, the punishment due for the crime of murder, was redeemable upon a pecuniary satisfaction, partly to the Sovereign, partly to the nearest of kin of the person murdered,

ed, for appeasing their wrath, and which in progress of time came to be distinguished by the name of assythment; the assythment thus claimable by the nearest of kin, was truly a species of the punishment of the crime, which was only due where the guilty person escaped the capital punishment, by means of a remission granted by the Sovereign: And therefore, as no such pardon or remission had been obtained in the present case, and on the contrary, as the petitioner had suffered the whole punishment decreed against him by the sentence of the court martial, he ought not to be subjected to a second or further punishment for the same offence, at the instance of the pursuers *qua* nearest of kin of the person said to be murdered.

These defences, with the answers thereto, made on the part of the pursuers, being taken to report, and very full memorials upon the case exhibited, you Lordships, upon the 24th *February* last, gave judgment, "Finding the defender liable to the pursuers in an assythment, and remitting to the Lord Ordinary to modify the same, and to do therein as he shall see cause."

The defender has thought proper to bring this interlocutor under review, by the petition now to be answered; and the argument being wholly confined to the two points last above stated: *viz.* 1st, That in a case so circumstanced as the present, no assythment is due. 2^{dly}, That the sentence of the court martial, proceeding upon the proof led before them, cannot be received or admitted as legal evidence of the alledged murder, *ad hunc effectum*, to found the pursuers in this action of assythment and damages. The respondents will endeavour, in the sequel of these answers, to maintain the propriety and justice of the judgment they have already obtained upon both these points.

And, in the entry, it cannot escape observation, that however ingenious the argument in this reclaiming petition, is to appearance, upon the principles assumed, but

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which, upon examination, will be found to have no solid foundation, the petitioner is pleased totally to overlook those general rules, and principles of law and justice, upon which this claim of damages is founded; an omission which cannot be imputed to oversight of so material a point in the cause; and, therefore, must be considered as proceeding from a conviction that they can receive no sufficient answer; and which the respondents, therefore, will take the liberty again to bring under your Lordships eye.

The general proposition which the respondents take the liberty to assume as an universal rule, founded on the clearest principles of law and justice, is, that in all cases, without exception, where a party suffers an injury or damage, *dolo vel culpa* of another person, the party injured, is entitled to have a suitable satisfaction decreed to him, for reparation of that injury or damage; and if that action would lye, where the injury or damage arises from petty delinquencies, it cannot but appear very extraordinary, if the atrocity of the injury, or the greatest criminal malignity of the person who commits the same, shall afford a defence against that reparation, which undoubtedly would be due, was the injury less atrocious or criminal.

From every crime whereby third parties are injured in their persons or properties, there arises a *duplex actio*, neither of which destroys the other, the one criminal *ad vindictam publicam*, the other *civil*, at the suit of the private party injured, or those who come in his place, for *reparation of the damages sustained*: And if murder, which is the highest injury one can receive, attended with damages in most cases, so great as to be incapable of any adequate reparation, is to be allowed as an exception from that general rule, it is the only exception known in the law.

If one wilfully sets fire to his neighbour's house, or robs him upon the high way, he may be prosecuted criminally, *ad vindictam publicam*; but that the satisfying public justice, should

should deprive the party injured, of their just claim for reparation of the injury or damage sustained by them, sounds extremely odd.

The doctrine of the civil law is express upon this point. *Matthæus*, in particular, in his title, *de damno injuria data*, establishes the general rule, and proves it by many authorities, both of the texts of the law, and of lawyers of the first character, that in all cases, without exception, where a party suffers an injury or damage, *dolo vel culpa* of another person, action lies at common law for reparation, *delinquendo contraxisse videtur*, and which, in the title *de sicariis* he explains thus: *Ex quocunque crimine publico et accusationem oriri, et actionem pecuniariam in id quod interest.*

So the rule is laid down in *l. 7. §. 1. Pand. de injur. &c.*, where, after stating the question, whether, in the case of murder, the party injured, should be allowed to prejudicate the *publicum judicium* by the *privatum*. *Ulpian* answers the question in these words: *Ex quibus causis publica sunt judicia, ex his causis non esse nos prohibendos, quo minus et privato agamus.*

And *Matthæus* in the same title *de sicariis*, §. 11. explains the nature of those damages, which, in the case of murder, the wife and nearest of kin of the murdered person, are, by the laws and practice of nations, entitled to claim *actione in factum*; his words are, *in factum actio moribus comparata est, quæ datur conjugi superstiti, heredibus, liberis, &c.* And then proceeds to state the several matters which properly enter into consideration, in ascertaining the *quantum* of that damage: And as the petitioner has not pretended to produce one contradictory authority, either from the texts or doctors of the civil law, or from the writers upon the public law, or from the laws and practice of modern nations, the respondents will be allowed to consider it as a
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general and universal rule, that from every crime whereby third parties are injured in their persons, fame or property, there arises a civil action or claim for reparation.

The action of assythment, by the law of *Scotland*, corresponds to the *privatum judicium* by the civil law, and to the action *ex facto*, by the laws and practice of modern nations: And upon that supposition, the respondents will now proceed again to bring under your Lordships eye, the repeated authorities formerly stated, both from the statute law of this realm, and from lawyers of the first character, for proof of this general proposition, that the *action of assythment*, allowed to the party injured, or to his nearest of kin *in the case of murder*, or other crimes, whereby third parties are injured, is, in the construction of law, a *claim of damages*, in satisfaction of the injury, and tho' arising *ex delicto*, is no part of the punishment of the crime itself, *ad vindictam*; and, in examining these, your Lordships will particularly carry it alongst in your eye, that the reparation thereby decreed, under the word *assythment*, is not confined to the crime of murder, but equally respects every other offence, greater or lesser, whereby third parties sustain an injury and damage.

Thus it is, that by statute 1424, cap. 33. it is ordered, That the party convict before the justices of stealing, or destroying green wood, shall pay an unlaw to the King, and *assyth the party skaithed*.—By the act 1424, cap. 46. it is enacted, That where the King gives remission to any man, *with condition to assyth the party skaithed*, if the parties cannot concord be themselves, there be chosen good men and leal sworn thereto, *to modify amends after the quality and quantity of the person, and of the skaith*.—By the act 1425, cap. 51. besides the punishment due to the public for breach of the King's peace, if done of forethought felony, it is statuted, that the justices, sheriffs, and other officers of the law, *shall garr the party hurt be fully assyth-*
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ed, after the quantity of the skaith that he has sustained.—1426, cap. 95. re-enacts the same thing in case of forethought felony, and appoints the officers of the law to cause *amends to be made, after the quantity of the trespass done to the party.*—By the statute 1457, cap. 74. the party taking to a remission for *spuilzie, theft, or reiff*, is ordained to find caution to content the party complaining within 40 days.—By the statute 1528, cap. 7. the same rule is established with respect to all other crimes, (except murder and mutilation, which, as the law then stood, the Sovereign could not pardon,) *viz.* That for all other crimes remitted by the Sovereign, caution should be found to *assyth the party injured*; and that action for obtaining such assythment, should be competent and privileged before the Lords of council.—By the statute 1584, cap. 136. which respects equally slaughters, *fire-raising*s, and *other* odious crimes, the King came under a solemn engagement, *in verbo principis*, not to grant remissions for any of said crimes that should be committed for the space of three years thereafter; and if any remission should be granted for such crimes of a prior date, that it shall be exprest therein, *that his Highness and treasurer have seen where the party is assythed*, otherways the remission to be of none avail.—The same thing was re-enacted, under the like exception, for a further term of years, by the statute 1592, cap. 117.

From the uniform tenor of these statutes, and many others to the same purpose, the respondents may fairly conclude, that by the sense and understanding of the legislature, the *assythment* decreed to be made to the party injured, or those claiming in his right, *in case of murder, fire-raising*, and other more enormous crimes, as well as in the lesser delicts, was intended and understood to be a pecuniary reparation, in satisfaction of the injury and damages, in some cases capable of a precise estimation, in others not. With what justice or propriety, then, it is said in the
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petition, to be rearing too great a fabrick upon so slender a foundation, to argue from the clear and exprefs words of such a series of statutes, for explaining the nature of the assythment allowed of in these cases, is humbly submitted.

But, in confirmation of these, the respondents do further appeal to the authorities and opinions of lawyers of the first character, both antient and modern, importing, that assythment denotes a pecuniary reparation to the private party, for the injury and damages done him.

And to begin with the *Quon. attach. cap. 69.* the title of which is precisely applicable to the case in hand, "*Licet curiæ in causa criminali taxare damnum partis.*" And in the text itself, the rule is thus laid down, "*Si quis dicat contra aliquem quod combussisset domum suam, vel interfecisset aliquem de progenie sua, et in appellatione dicat quod damnum ei fecit inæstimabile, taxabitur per viros fide dignos curiæ rationabile damnum, quod appellans recepit de morte sui amici.*"

To the same purpose *Balfour*, treating of assythment for slaughters, fol. 516. cap. 1. explains the matter thus:—"Be the law and consuetude of this realm, the assythment or kin-boot, made or adjudged to be paid by the committers of slaughter to the kins, bairns and friends, is given to them in contentation of the hurt, damage, or skaith, sustained be them, thro' the wanting of the person that is slain, and for skaith incurred be them therethrough;" and for pacifying their rancour.

Lord *Stair*, book 1. tit. 9. § 7. gives the same explanation of the matter: His words are, "*Affythment, as it signifies the reparation made, so, it insinuates the obligation to repair the damages sustained by slaughter, or other injuries; but it is chiefly pursued by the wife, or bairns, or nearest of kin of parties slain; and tho' the private parties interest be only for reparation of damage and loss, yet our*" custom

“ custom applieth much of that which is penal therein to the injured.”

Such also is the language of Sir George Mackenzie, in his *Criminals*, title *Remissions*, § 3. “ Albeit his Majesty may remit what injury is committed against him, yet he cannot prejudge thereby *the interest* of third parties: This satisfaction is by the Civilians called *reparatio damnorum*; by us, an *assythment*: And the obtainer of the remission must find caution to refund the party injured of all his *damage and interest*.”

Lord Bankton, book 1. tit. 10. § 15. treating of assythment, defines it thus, *a consideration given to repair the damage sustained by death, mutilation, &c.* And throughout the whole remainder of that title, where he treats of the like assythment for theft, robbery, &c. he concurs in opinion with the other authorities above stated, that by the word *assythment* is understood, not the punishment of the crime, but the reparation due to the private party, for the injury and damage he has sustained.

And as in the crimes of *fire-raising*, *robbery*, *spuilzie*, and others of the like nature, attended with a certain *patrimonial* damage, the assythment, *quoad* these, cannot be considered as the punishment of the crime, but as *debitum justitie* to the party injured; it is to the respondents inconceivable, how the word *assythment*, applied to *different* crimes in *one and the same statute*, and by the same uniform expression, can intend such opposite things, as, in the case of murder, to signify part of the punishment of the crime, and in all the others, a pecuniary satisfaction to the private party, for reparation of the injury and damage he has sustained.

Having thus endeavoured to establish those principles of law and justice upon which the present action is founded, the respondents will now proceed to the more particular consideration of the very ingenious arguments that have been

been pleaded in support of the contrary proposition assumed by the petitioner.

The argument is introduced with an observation, which, the petitioner says, must be *obvious* to every person who reflects on the origin of society and of nations, *viz.* That in the remote and barbarous ages, criminal judicatures would gain footing *much later* than other institutions necessary for the subsistence of society, when there was no established or regular system of punishment, but that every person was the avenger of his own wrong.

To what period of time, or ages of the world, the petitioner means to refer for this imaginary state of supposed barbarity, the respondents are at a loss to conceive: That particular nations, even after being once civilized, and brought under some system of government, may have relapsed into a state of barbarity, as was the case of some of the more northern nations, and that some nations in the remoter parts of the world, may remain at this day in such state of barbarity, the respondents shall not dispute; but that mankind in general, since the creation to this day, ever were in such a state of universal barbarism, as the petitioner supposes, the respondents can by no means agree.

The origin of particular nations is involved in obscurity, nor does history inform of any people, amongst whom government and jurisdiction, criminal as well as civil, were not established in some degree; and as crimes are, in their nature, most offensive to society, especially those of an enormous kind, it is reasonable to think, that the suppression and punishment of these would be the first and principal object of attention, for the protection and security of those living in the same society, in their persons and properties, against the violence and injuries of their fellow subjects.

In the earliest ages of the world, before mankind came to separate and divide into different states and nations, the sovereign power, both for punishment of crimes, and administration

ministration of justice, rested in the *pater familias*, who had the power even of life and death over those of his own family; and it was this power, which, upon the junction of more families into civil societies, whereby nations and states were formed, was transferred to the sovereign of each respective state.

Was it a supposable case in this advanced state of the world, that either from the want of government, or from the defect of power, criminals could not be brought to justice, the respondents shall not dispute, how far, *in such case*, it would be allowable for the party injured to take amends at his own hand, where justice could not be otherways procured.

Such is the law at this day, between nations independent of one another; but that persons living in the same society, and under the same government, should, at any period of time, have been authorized *sibi jus dicere*, and, at their own hands, to take amends for supposed wrongs and injuries, is inconsistent with every idea of government and society.

It is believed, no nation of the world was ever guilty of greater excesses in this respect than the subjects of *Scotland*, where the noble families were engaged in constant civil wars upon every trivial matter. The hands of government were then too weak, either to repress or punish such disorders; the fault did not lye in the defect of the law, but in the want of power; and, so far as the respondents can discover, it never was the law of *Scotland*, at any one period, that parties should be at liberty to do themselves justice upon their fellow subjects, for redress of wrongs real or imaginary: No lawyer to the respondents known, has said so; and it will not be taken upon the petitioner's bare assertion.

Upon this hypothesis, however, does the petitioner raise his whole ideal superstructure, taking it for granted, that

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in those earlier ages of the world, every person was the avenger of his own wrong; the gradual progress by which he supposes this power to have been wrested out of their hands, as civil societies and government came to be established, is fanciful to the greatest degree:—That the law taking advantage of the *avarice* of mankind, deprived them of that dangerous privilege of revenging themselves, by *fixing stated compositions* to be paid by the offender to the party injured, for the most atrocious, as well as the most trifling crimes, under the several denominations of *croo*, *galnes*, *vergelt*, *kelchyn*, *enach*, &c. and that, as *this method* of redeeming guilt by a pecuniary ransom, was unfuitable to the idea of the punishment due to crimes, and gave a manifest advantage to the rich over the poor, these last not having the means to redeem themselves, government by degrees assumed the power, both of inflicting the punishment due to the crime, without respect of persons, as also, to dispense with the punishment, where the circumstances of the case pleaded for mercy; and that, as this dispensing power would, in its origin, be viewed with a jealous eye by those barbarous nations, who still relished the idea of being their own avengers, the dispensing power in the hands of the sovereign, was qualified with the condition of the assythment being made to the private party injured; and that, as this assythment was, in its origin, a *solatium* or peace-offering, to appease the rancour of the injured party, it so far retains its original nature, as to be part of the punishment inflicted upon the guilty person, exigible only where the Sovereign interposes his dispensing power, in remitting the capital punishment due to the crime itself, as appears from the tenor of the letters of *Slains*, in use to be granted by the party injured, or by his nearest of kin, in the case of murder.

This, if the respondents mistake it not, is a fair state of the petitioner's whole argument upon this point; but as the

the hypothesis upon which it proceeds, has already been shown to be void of all foundation, the respondents take the liberty to deny all and each of the consequential arguments raised upon it; and more particularly, that at any one period, this privilege of redeeming such atrocious crimes as murder, and others of the like nature, was acknowledged in the law of *Scotland*, or in any other state or nation, where a regular system of laws and government obtained.

What may be the just import and meaning of these barbarous words, scattered and dispersed in the books of the *Majesty*, is at best matter of conjecture; that they are not synonymous, as signifying one and the same thing, will be obvious, from comparing the different passages. But allowing, for argument's sake, that all and each of them import a pecuniary satisfaction, in whole, or in part, to the party injured, the respondents deny the consequence, that they are therefore to be considered as a ransom of the crime, or as part of the punishment, exigible only in the case where the Sovereign interposed, by granting a remission.—No such thing is to be found in the texts themselves, nor has any lawyer to the respondents known, advanced so absurd a doctrine.

From the general principles and rules of law as above established, it is clearly proved, that a suitable reparation for the injury and damage sustained by the commission of every crime, greater or lesser, is a *debitum justitiæ*, which no power on earth can dispense with. The Sovereign, by his royal prerogative, may remit the punishment due to public justice, where the circumstances of the case are such, as intitle to mercy: But this dispensing power can never go the length to preclude the party injured from demanding that reparation which is due for the injury and damage he has sustained. And when the statute laws of this country, from the earliest period down to this day, are examined,

ed, it will be found, that the punishment decreed against crimes, or the remission of these by the Sovereign, are qualified with no such exception, but directly the contrary.

The oldest statutes extant, are those of *Malcolm II.* In chap. 3. § 4. mention is made of criminals condemned to death, *de homine condemnato ad mortem*.—In chap. 11. of the pleas of the crown, which inferred a capital punishment, loss of life, and escheat of moveables.—In chap. 12. § 1. The crime of treason infers further, forfeiture of the real estate.—In chap. 13. and 14. All these criminals are expressly ordered to be punished with death; nor in any of these most antient laws, is the smallest hint given, of the punishment being redeemable by a pecuniary composition.

The books of the *Majesty*, allowing, for argument's sake, these to make part of the law of *Scotland*, are full of authorities to the same purpose. And, more particularly, in *Book 1. cap. 1.* where the *placita coronæ* are distinguished from other crimes inferring capital punishment, the crime of murder is specially mentioned as one of those crimes whereof the punishment is death, without the most distant insinuation of any of these atrocious crimes being ransomable.

The same principles are to be found in the *Quon. Attach.* dispersed in a variety of places, particularly, chap. 12, 18, 19, 75, and 77. and which are uniformly carried down in all our subsequent statutes.

And, if conjectures are allowable, of what may have been intended by those passages in the books of the *Majesty*, where mention is made of the *croo*, *kelchyn*, *enach*, &c. as the price of blood, and satisfaction of injuries, it is rational to think, that it was not the ransom of the blood of the guilty person from the capital punishment that was thereby intended, but an adequate satisfaction or ascertainment of the damages as due, either to the
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state, for the loss it sustained by being deprived of a subject, or to the private parties, for the injury and damage they sustained by the commission of the crime. The rationality of this conjecture will be obvious, upon considering the several articles in *Book 4. cap. 40.* which ascertains the *quantum* of the composition payable by the guilty person, in each of the offences therein enumerated, where, from the nature of the offence, it was impossible to ascertain, with precision, the real damage that the injured party sustained, such as murder, demembration, broken bones, wounds, strokes, and other assaults upon the person; the *quantum* of which damage was thereby rated higher or lower, according to the degree of the injury; but from thence to infer, that these were intended, as a pecuniary ransom from the punishment of the crime due to public justice, is, with all due deference, a most groundless conceit, unsupported by any authority.

The limitation imposed by the several statutes in that behalf made upon the royal prerogative, in granting remissions for murder, and other such like odious crimes, without a proper satisfaction, or assythment made to the party injured, is quite consistent with the principles already laid down, as supposing the assythment due to the party injured, to be a *debitum justitiæ*, which the Sovereign had no power to remit. Experience had proved the fatal consequences arising from the licentiousness of those barbarous times, when parties injured, instead of applying to government for redress of their wrongs, took revenge at their own hands, in which no proportion could be observed in commensurating the reparation to the injury received, where the party being judge in his own cause, would take such amends as rancour and resentment prompted him to; and as the hands of government were then too weak to suppress the commotions thereby established, it was a *prudent* measure, for the peace of the country, and security of the lieges, *so to qualify the*
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King's power of remission of crimes, that it should be an express condition of the parties being assythed, manifestly supposing the claim of assythment, for a suitable reparation of the injury and damage sustained, to be so much a *debitum justitiæ*, that no pardon ought to be granted, where such a satisfaction was not already made.

Accordingly, we find, that in the statute of *David II. cap. 44.* the same is so limited, as to be void and null, unless satisfaction was made to the party injured. The title of the law is, *De remissionibus criminum per regem concessis*; and the enacting words are, "Item statutum est, quod remissiones regis, concessæ vel concedendæ pro quibuscunque transgressionibus, sint cassæ et nullæ, nisi satisfiat parti infra annum à data earundem."

This prerogative, in the case of murder, was subjected to this further limitation, by *cap. 15.* that where the murder was committed by forethought felony, *ex præcogitata malitia*, the Sovereign should grant no remission, *nisi tantum ex concilii generalis deliberatione communi*, (that is, by consent of parliament) *si iis visum fuerit pro communi utilitate expedientius faciendum.*

And in *Book 3. of the Majesty, cap. 17.* this power of remission in the case of murder, is qualified with this further condition, that it be granted *per concilium et assensum progeniei illius sic occisi.*

And in conformity to these, all the after statutes, from the reign of *James I.* downwards, make it an express condition of remission granted by the Sovereign, not only in the case of murder, but of other odious crimes, that the same shall be ineffectual to stop the course of justice, in inflicting the capital punishment, unless satisfaction has been made to the party injured, or nearest of kin.

This was not properly speaking, so much a limitation of the prerogative royal, as to obviate a doubt, which might possibly be entertained, whether the pardon of the crime, did

did not, by necessary consequence, avoid every consequential claim arising therefrom: And therefore, the respondents will be allowed to consider these repeated declarations of the legislature, touching the import and effect of the royal pardon, as so many express acknowledgments of the justice and equity of that claim competent to the nearest of kin, on the part of the person murdered, to have a suitable satisfaction for the injury and damage thereby sustained; and by no means a ransom from the punishment due to publick justice, or as only exigible where a remission is actually granted.

There is no other difference in this respect, between murder, and other atrocious crimes, such as fire-raising, robbery, &c. but that the damage sustained by the party injured, is in one case more capable of a precise *liquidation* than in the other; the principle is the same in both, and the claim of *assythment* is *equally* founded in both.

The last authority that shall be mentioned upon this point, and which, in the respondents apprehension, is *per se* decisive against the doctrine contended for by the petitioner, is the act 1661. cap. 22. entitled *Concerning the several degrees of casual homicide*, whereby, in the cases of casual homicide, or homicide in self-defence, thereby excused from capital punishment, it is *in terminis* enacted, that the person who has committed the murder, shall be fined in his means, to the use of the defunct's wife and bairns, and nearest of kin, manifestly inconsistent with the supposal, that the assythment due to the relations of the murdered person, is the ransom of the punishment of the crime, or exigible only in the case of a remission: And the fallacy of the petitioner's whole argument consists in assuming the *exceptions* from the rule, as the *rule itself*: The *rule* is, generally, that from all crimes, whereby an injury or damage is done to third parties, an assythment or reparation is due; and the only exception from that

that rule is, where the party injured or nearest of kin, have consented to the remission, by granting letters of *Slains*, or otherways.

And this cannot be better illustrated, than from the tenor of these letters of *Slains*, as referred to in the petition, whereby the nearest of kin of the party murdered, not only declare their oblivion and forgiveness of the injury itself, and all rancour, revenge, resentment, &c. on that account, but more particularly discharge him of all *action civil*, competent against him, or his *estate and goods*, on that account; the only *action civil*, competent to the private party in such case, is the action of assythment or damages.

It is, therefore, improper to consider this as a double punishment for the same offence; the *publicum judicium* concurs with the *privatum judicium*, the one *ad vindictam*, for satisfying publick justice, the other *ad interesse* of the party injured; and tho' this last arises *ex delicto, et ex quasi contractu, quia delinquendo contraxisse videtur*; it is a consequence of the crime, but no part of the punishment: And therefore, as the petitioner stands now convicted by sentence of a competent court, of having committed this murder, tho' by the peculiarity of the martial law, he has escaped the capital punishment, there is neither justice nor reason, that he should reap this *further* advantage, to the prejudice of third parties, of being thereby excoemed from making a just satisfaction to them for the injury and damages they thereby sustained.

The petitioner says, that cases may be figured, where the life of the person murdered, was rather a burden, than an advantage to his friends and family: And therefore, that in such case, if the assythment was intended as the reparation of a patrimonial loss, none such would be acclaimable in the supposed case, the defence would be relevant, that the family was rather benefited than hurt by the death

death of their relation, which therefore must be admissible to proof.

Was this proposition to be allowed, it would say nothing to the present case, where it is not alledged that the unfortunate young man was in such circumstances, as that any benefit or advantage could accrue to his family from his untimely death; most general rules, will, no doubt, admit of particular exceptions, but in the case of murder, the law, *ex eo quod plerumque fit, presumes, et statuit super presunto*, that an injury or damage is sustained by the nearest of kin of the murdered person: They lose their relation himself, with all the *hopes, and comfort, and prospects* connected with him; and for that injury and damage, it decrees a suitable reparation shall be made, subject to the modification of the judge, as to the *quantum* of the assythment, according to the circumstances of parties.

Whether this assythment is due by the peculiar law of *Scotland*, in the case of murder, where the capital punishment is inflicted, is a speculative question, unnecessary to be here argued, as it does not apply to the case; and tho' some lawyers have held it to be law, the respondents will be pardoned to doubt, if it is founded in the principles, either of law, justice, or reason: But supposing it to be law, and, as such, to be another exception from the general rule (if conjectures may be allowed) upon which it is founded, it is reasonable to think that it was *in favorem fisci*, upon the same principle, that denunciation for a civil debt carried the escheat of moveables, exclusive of the debt upon which the denunciation had followed, till that was remedied by express statute, burdening the escheat, with payment of the debt upon which it had fallen. Every capital punishment carries with it the escheat of moveables: And as these were the proper funds, out of which the assythment to the injured party fell to be made good, the *favor fisci*, in those earlier periods of the law, may have
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been too powerful, in competition with the more just and equitable claim of the nearest of kin, acknowledged in every period of the law, by so many repeated statutes, limiting the Sovereign's power, of granting remissions, without such assythment, or reparation be made to the party injured.

If Captain *Macharg* had received no more than the nine wounds which were not judged to be mortal, and had thereby escaped with life, it is a clear case, that he, or his nearest of kin, as in his place, must have been intitled to a suitable assythment for the injury and damages thereby sustained, independent of the punishment due to public justice for the assault and breach of the peace; and upon that supposition, how absurd must it appear, that the aggravation of the injury, by the *addition* of two *mortal* wounds which bereaved him of his life, should operate an *absolvitor* to the guilty person from that assythment which would have been due, had Captain *Macharg* escaped with life; especially where, as in this case, the capital punishment was not inflicted, and consequently no forfeiture, either of the single or liferent escheat, and consequently no deficiency of funds out of which the assythment can be made good.

The petitioner further observes, that cases must have occurred, where persons convicted of capital crimes have escaped the punishment, either by breach of prison, or by death before execution of the sentence; in either of which cases, the action for assythment was competent, if considered as a civil debt; but as no instance is to be found, where such action was brought in any of the supposed cases, the inference from thence drawn is, that it must have been generally understood, that no claim for assythment was in such case due: And which he considers as a further confirmation of the proposition formerly assumed, *viz.* that the assythment is but an accessory to the
remission

remission of the crime, and consequently not exigible where no pardon is granted, or where the criminal escapes the punishment by any other means.

It is easy to account, why few or no examples have occurred of processes for assythment being brought, where the guilty person escaped the punishment by death.—The intermediate space between the sentence of condemnation and execution is in most cases so short, that there is not sufficiency of time for processes of that nature, *et actiones pœnales non transeunt in hæredes* ; and the examples of criminals escaping by breach of prison, are so rare, that no conclusion can be drawn from it ; besides, that in most cases, the persons convicted of such enormous crimes, are in such low rank and mean circumstances, that they have not wherewithal to make a pecuniary satisfaction for the injury and damages.

And therefore, to conclude upon this point, the respondents submit it to your Lordships, that as the claim of assythment, though arising *ex delicto*, is a *debitum justitiæ*, for reparation of the injury and damage which the private party sustains, it can, with no propriety, be considered, either as the ransom of the punishment due to public justice, nor as depending upon the Sovereign's remission : And more particularly, that as in this case no capital punishment has been inflicted, the petitioner is bound, by every principle of law and justice, to make a proper satisfaction for the injury and damage sustained by the murder which he is proved to have committed.

And this leads to the *second* defence now insisted upon, importing, that neither the proof taken upon the trial, nor the sentence thereupon pronounced, can be received, or admitted as a proper foundation upon which your Lordships can proceed to judgment upon the claim of assythment ; and that supposing that claim to be, in other respects, well founded, and the proper subject of a civil process, it is essentially

fentially requisite, that the fact should be established upon evidence adduced in this process.

The respondents, for answer, say, that as the court-martial, though acting in foreign parts in the trial of a *British* subject, derived its force and authority from the laws and constitution in this country, their proceedings, and the judgments by them pronounced, must be of equal force as the proceedings and sentence of any other court of criminal jurisdiction in this country would have been: And as a sentence absolvitor of that court-martial would undoubtedly have protected the petitioner from any after-trial for the same crime in the courts of this country, no reason can be assigned, why a sentence absolvitor should operate more strongly in point of jurisdiction and authority, than a conviction and sentence condemnator.

It is a clear case from the several statutes above referred to, respecting the King's remission, that the claim of assythment may be prosecuted as an action of debt before any competent court having jurisdiction in such matters,—the court of session, the sheriffs, or other judges ordinary. And as it has been already demonstrated, that this claim for assythment is independent of the remission, as the conviction before the proper criminal court establishes the guilt of the crime against the party convicted, from which the claim of damages arises, the one springing out of the other, it is the sentence of conviction which founds the claim of assythment; and it is much doubted, if your Lordships would sustain a claim of this kind, founded upon an alledged murder, where there had been no previous trial and conviction of the crime itself: That is the mode prescribed by law for the trial and conviction of crimes of an atrocious nature; the trial must be *per pares*; no such mode of trial by juries is competent in the civil court; and therefore, the sentence of the proper criminal court is *probatio probata* of the *guilt* or *innocence* of the party accused,

fed, upon which all the legal consequences must necessarily depend.

In trials of falshood originally brought before this court, the forgery being proved, and it appearing to be of fuch a nature as to merit a remit to the court of jufticiary, the fentence of this court is *probatio probata* of the falshood; whereupon the court of jufticiary proceed to fentence, upon *no other* evidence of the crime, but the judgment of this court; upon the credit and authority of which, the jury muft return their verdict, finding the pannel guilty: And upon the fame principle, the respondents do humbly maintain, that, as the crime of murder is only cognofcible in the criminal court, and as the claim of affythment is grafted upon the fentence of condemnation in that court, your Lordfhips, in judging of that claim, can require or receive no other evidence of the guilt than the fentence of condemnation.

The fame principle prevails in many fimilar cafes.—Marriage and legitimacy muft be tried, in the firft inftance, before the confiftorial court, and, according as judgment is there given, the one way or the other, *habetur pro veritate*, where that fentence is not brought under review by a court of fuperior jurifdiction.

This might be illuftrated by manifold examples; one fhall fuffice:—If a woman, *having obtained declarator of marriage*, fhould bring an action of aliment againft her hufband, or if a child, who *has obtained declarator of legitimacy*, fhould bring the fimilar action for afferting his birth-right, and produce, for evidence of thefe, the *decreets* of the *competent* courts for trial of thefe matters; what for a defence would it be, that your Lordfhips could pay no regard either to the proof upon which thefe decreets proceeded, or to the decreets themfelves? The answer would be obvious, that the facts upon which thofe consequential actions were founded, being eftablifhed by fentences of

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the proper court, *habetur pro veritate*; and your Lordships would be bound to proceed upon them as such.

The decrees of foreign courts can receive no execution either direct or consequential, but by interposition of the authority of the judges of this country, which, being only due *ex comitate*, intitles them to examine the justice of that foreign decree before they interpose their authority thereto. But decrees or sentences of the *proper* court of *this country* stand upon a different footing: The criminal judge must pronounce that judgment, which, upon conviction, the law awards for crimes of that nature; the claim of damages arising *ex delicto*, actionable before the civil court, is not *ex comitate*, but *ex iustitia*; and it sounds oddly, that the court of civil jurisdiction, in awarding damages consequential of the conviction of the crime, should be at liberty to disregard that decret, *on which the criminal has been sentenced and punished*, in every question of civil right arising from that conviction.

But allowing, for argument's sake, that your Lordships were as much at liberty in the one case as in the other, the rule established in the case of *Edwards contra Prescot*, 29th December 1720, respecting a decree of the court of King's Bench in *England*, was, that execution ought to pass upon said decret, unless something competent in law should be objected against it. This rule has been followed in several other cases; and were your Lordships to assume that rule in the present case, it would not avail the petitioner, as no possible objection can lye either to the form or relevancy of the indictment, to the proof of the crime, or to the sentence itself.

The case of *Mildovan* in 1739, again appealed to on the part of the petitioner, where the court found, that the verdict of the jury in the trial before the court of justiciary, convicting the pannel of theft, was not *probatio probata* in the action of damages before the civil court, and therefore,

therefore, that it was still competent to object to that proof, is but a single decision, attended with so many specialities, that it ought not to be made a precedent of: The verdict of the jury was inconsistent and contradictory; as, at the same time that it found the pannel guilty of the theft, it found his *alibi* proved by two witnesses; one of the capital witnesses in the criminal trial had, in the intermediate space between that and the civil action, been declared infamous and intestible: But, notwithstanding all these specialities, your Lordships did not reject the proof adduced in the criminal trial; all that was there found, was, that it was still competent to object thereto.

At the same time, they must again recal to your Lordships remembrance, the judgment that was given in the case of *Wilson* contra *Brunton* and *Chalmers* in 1756: *Wilson* having recovered a decree in the court of King's Bench against *Brunton* and *Chalmers*, for 60 *l.* of costs, brought his action before your Lordships, for making that decree effectual: Your Lordships, it is true, refused to give execution upon that decree; but *Wilson* having taken his appeal, the House of Lords reversed your Lordships decree, and decreed execution to pass; a judgment of the highest authority in point to the general argument.

And, therefore, to conclude upon this point, the respondents submit to your Lordships, that as no exception is, or can be taken, either to the form of the trial, proof of the crime, or sentence thereupon pronounced, the judgment of that court must be regarded as a legal conviction of the crime charged; and that the claim of assythment does necessarily arise therefrom.

The petitioner concludes with some critical observations upon the words of the judgment itself, which he is pleased to understand, as not convicting him of the crime of murder, but of some lesser offence, merely, because the capital punishment was not inflicted; but as the judgment
itself

itself lyes before your Lordships, which, in so many words, certifies it to have been the opinion of the court, *that he is guilty of the crime laid to his charge*; so it expresses the reason why the capital punishment was not inflicted, *viz.* that there was not such a majority of voices for inflicting the capital punishment as the articles of war required: It would have inferred a nullity of the whole sentence, if, upon an indictment for murder, he had been convicted only of a misdemeanour, or other petty offence; but that is a point unnecessary to be argued, where the sentence is so clearly expressed, finding him guilty of the crime laid to his charge, that is, the crime of murder.

In respect whereof, &c.

Weregeld-Compositio

ALEX. LOCKHART.

nimm gntzst fragn, und gnbessert.

Jus Germ. l. §. 407. Ubi locus non erat poenae privatae (für buß) ibi cessabat et publica (für mitter).

Antiquitus pro magno peccato paucillum pena satis erat — temporibus tamen antiquissimis crimina quaedam, e.g. contra temp. vel officij boni civis & capitalia erant — Saxones supplicia etiam in cognatos irrogarunt.

Poenae. Freedum, qui delicti atrocis admiserat, nusquam pace fuebant; (sin mittern umb in freidum in dem un freidum gntzst). Ut defensionem publicam recuperaret, FISCO poenae erat prestanda, quae Freedum, quasi redemptis pacis dicebatur.

*Faida. Non solum facinorosos homines persequabatur; verum etiam familia laesa cui fas erat, eos bello privato aggredi, nisi in tempore transgissent. Libellus publicus, nimm unde satisfactio quam recipiebat universa domus Faida dicebatur. quasi quae ad redimendum illud bellum privatam daretur. — Hic mos universam Germaniam pervaserat. hinc in legibus poena omnibus, faida mentio fit. Ego locuta fuit & solum in homicidio, sed in alijs delictis gravioribus. — pecunia soluta — littera, quae vocabantur *securitatem de homicidio* — & *Letters of Slaines*.*

Hanc consuetudinem Reges improbarunt, mansit tamen armorum licentia, legibus non suffragante. Cum Faida convenit Compositio, i.e. multa laeso vel ejus agnato solvenda (Widregildum q.d. nimm primus gntzst). Si homo occisus Werregeldum. q.d. mittern-gntzst, a mittern, vel mittern. Haec compositio in Capitalibus etiam delictis, quae poena corporis afflictiva coercerent, habebat locum. Nullum enim fere Germanis erat delictum, ejus poenam non liceret pecunia redimere si simul satisfaceret laesis. praeter crimen laesae majestatis.

Chrenceludum. professio nihil facultat esse — eo casu cognati solvere tenebantur.

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